

Nov 02, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

HERNAN SICAIROS-TAMAYO,

Defendant.

No. 4:20-cr-06013-SMJ

**ORDER DENYING THE
GOVERNMENT’S MOTION TO
RECONSIDER**

On October 15, 2020, this Court ordered Assistant U.S. Attorney (AUSA) Richard C. Burson recuse himself from the hearing on Defendant’s motion to sever counts, ECF No. 52, and motion to suppress evidence, ECF No. 53, and that the United States Attorney’s Office (USAO) appoint a new AUSA to represent the Government during the hearing. The Court memorialized that oral ruling in an Order dated October 19, 2020. ECF No. 70. Before the Court is the Government’s Motion to Reconsider that Order. ECF No. 72. The Court is fully informed and denies the motion.

BACKGROUND

Defendant Hernan Sicairos-Tamayo faces three charges in this case: one count of Possession with Intent to Distribute a Controlled Substance in violation of

1 21 U.S.C. § 841(a)(1), (b)(1)(B)(viii), one count of Possession of a Firearm in
2 Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. § 924(c)(1)(A),
3 and one count of Alien in the United States after Deportation in violation of 8 U.S.C.
4 § 1326.

5 The drug trafficking charges at issue arise from the seizure of
6 methamphetamine from Defendant's apartment after his roommate, Estela Elvira
7 Sandoval, allegedly consented to a search. Defendant moved to suppress evidence,
8 arguing that the agents coerced Ms. Sandoval's consent. ECF No. 53 at 2.

9 On October 15, 2020, at the originally scheduled hearing on the motion to
10 suppress, defense counsel learned during the lead agent, Special Agent Daina Nuñez
11 (SA Nuñez)'s testimony, that Mr. Burson and SA Nuñez had discussed obtaining
12 Ms. Sandoval's consent on the date the search took place. At that point, Defendant
13 requested Mr. Burson's recusal on the basis that he might call Mr. Burson as a
14 witness in the matter. The Court granted the request and ordered the USAO assign
15 a new AUSA to the matter.

16 The Government filed this Motion to Reconsider, ECF No. 72, as well as a
17 Motion to Expedite, ECF No. 73. The Court granted the Motion to Expedite and set
18 an expedited briefing schedule. Defendant filed a response, ECF No. 76, and the
19 Government filed a reply, ECF No. 77. The Court ordered Defendant to disclose if
20 he plans to call Mr. Burson as a witness, and to provide a compelling need for Mr.

1 Burson's testimony that could not be satisfied by other sources of testimony. ECF
2 No. 78. Defendant responded, indicating that he plans to call Mr. Burson as a
3 witness at both the hearing on the motion to suppress and at trial. ECF No. 79. He
4 also listed a series of questions that he plans to ask Mr. Burson at the hearing. *Id.*

5 **LEGAL STANDARD**

6 "A defendant has an obligation to exhaust other available sources of evidence
7 before a court should sustain a defendant's efforts to call a participating prosecutor
8 as a witness." *United States v. Prantil*, 764 F.2d 548, 551 (9th Cir. 1985). But a
9 Defendant need not always "resort to alternative means of adducing factual
10 testimony." *Id.* at 551–52. Although "courts have generally disfavored allowing a
11 participating prosecutor to testify," defendants may call a prosecutor to testify if
12 they demonstrate a "compelling need." *Id.* at 554 (citing *United States v. West*, 680
13 F.2d 652, 654 (9th Cir. 1982) and *United States v. Tamura*, 694 F.2d 591, 601 (9th
14 Cir. 1982)). "[T]he court must honor the defendant's constitutional rights under the
15 confrontation and compulsory process clauses of the Sixth Amendment." *Id.* at 552.

16 Courts must consider if the testimony would be duplicative and the quality
17 and quantity of alternative evidence, as well as policy concerns, including the risk
18 that a testifying participating prosecutor would not be a fully objective witness
19 given his position as an advocate for the government, preventing the prestige and
20 prominence of the prosecutor's office from being attributed to testimony by a

1 testifying prosecutor, eliminating jury confusion, and promoting public confidence
2 in the criminal justice system by avoiding the appearance of impropriety. *Id.* at 552–
3 553.

4 **DISCUSSION**

5 Defendant has shown a compelling need for Mr. Burson’s testimony.
6 Defendant indicated that he plans to call Mr. Burson to testify at the hearing on the
7 motion to suppress. ECF No. 79 at 1. He lists a series of twelve questions that he
8 plans to ask Mr. Burson, including “What facts did you rely on to make the decision
9 to have the agent seek consent?” and “In reaching the decision to seek consent, was
10 this discussed with your supervisor?” ECF No. 79 at 2. SA Nuñez cannot answer
11 these questions.

12 Whether the Court’s decision eventually hinges on Mr. Burson’s testimony
13 is immaterial. True, SA Nuñez and Mr. Burson’s conversation did not occur in the
14 presence of Ms. Sandoval. But Mr. Burson spoke with SA Nuñez about exactly the
15 issue at the crux of this hearing. Policy considerations, then, weigh in favor of
16 allowing Defendant to call Mr. Burson as a witness, and Mr. Burson’s recusal. And
17 although jury confusion issues do not arise during a motion to suppress, the Court
18 must still ensure witness neutrality and public confidence to the extent possible.
19 “The advocate-witness rule is aimed at protecting the integrity of the fact-finding
20 process, not at distorting the process itself.” *Prantil*, 764 F.2d at 554. Allowing

1 Defendant to call Mr. Burson as a witness will preserve the fact-finding process,
2 protect Defendant's constitutional rights, and allow this Court to make an informed
3 decision regarding the issue of consent.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 **1.** The Government's Motion to Reconsider, **ECF No. 72**, is **DENIED**.

6 **A.** The USAO must **APPOINT** a new AUSA to represent the
7 Government during the hearing on Defendant's motion to sever
8 counts, ECF No. 52, and motion to suppress evidence, ECF No.
9 53, on November 6, 2020.

10 **B.** The Court **ORDERS** that Mr. Burson not have any additional
11 contact discussing the facts in this matter with any of the
12 potential witnesses in this case.

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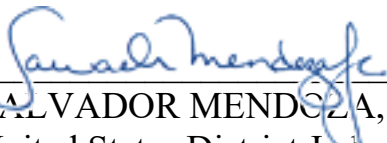
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1 C. The Court does not rule on whether Mr. Burson must
2 permanently recuse himself from this case, or whether the
3 recusal is limited to the motion hearing only.

4 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
5 provide copies to all counsel, the U.S. Probation Office, and the U.S. Marshals
6 Service.

7 **DATED** this 2nd day of November 2020.

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9 
10 SALVADOR MENDOZA, JR.
 United States District Judge